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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. —

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

GOLDBLATT BROTHERS, INCORPORATED, A CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the Administrator of the Wage and Hour Division, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit, entered June 25, 1942, reversing in part and affirming in part a decree of the United States District Court for the Northern District of Illinois, Eastern Division, and remanding the case to that court for further proceedings in accordance with the opinion of the Circuit Court of Appeals.

OPINIONS BELOW

The opinion of the District Court (R. 527–535) is reported in 39 F. Supp. 701. The opinion of the

Circuit Court of Appeals (R. 552–559) is reported in 128 F. (2d) 395.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 25, 1942 (R. 560). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Respondent, the operator of ten general department stores in Illinois and Indiana and of three warehouses in Illinois, receives at the warehouses large quantities of merchandise in interstate commerce for the purpose of distributing such merchandise to the ten stores. The flow of goods from the manufacturers and suppliers in other States through the warehouses to the department stores is large, constant, and rapid. Various groups of employees at the warehouses are engaged in checking and counting or performing other clerical work with reference to the extrastate merchandise after it is deposited on the unloading platforms, in moving it into the warehouses to await shipment to the Illinois and Indiana stores, and in distributing it to the Illinois stores. The queston is whether such employees are "engaged in commerce" within the meaning of Sections 6 and 7 of the Fair Labor Standards Act.[1]

[1] In the event that the petition is granted, the Government will also contend that, even if distribution from the ware-

2. At the warehouses respondent also manufactures forms and record books for use in its stores and prepares advertising copy, mats, and the like, for use in both Illinois and Indiana. The question is whether the employees who perform these tasks are engaged in "the production of goods for commerce" within the meaning of Sections 6 and 7 of the Act.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act are set forth in the Appendix, *infra*, pp. 13–14.

STATEMENT

On April 16, 1940, the Administrator filed a complaint (R. 2–7) against respondent alleging that it employed more than 1,000 employees at its three warehouses in Chicago, Illinois, that these employees were "engaged in commerce" or in "the production of goods for commerce" within the meaning of Sections 6 and 7 of the Fair Labor

houses to the Illinois stores is not within the scope of the Act, many of the employees engaged in such distribution are nevertheless covered because they are also engaged in distribution to the Indiana stores. Similarly, we shall contend that, even if the checking, moving, etc., of goods destined for the Illinois stores after arrival at the unloading platform is not work "in commerce," many of the employees so engaged are covered by virtue of the fact that they also handle goods destined for the Indiana stores. Cf. *Currin* v. *Wallace*, 306 U. S. 1, 11; *Mulford* v. *Smith*, 307 U. S. 38, 47–48; *United States* v. *Darby*, 312 U. S. 100, 118, 121–122; *Baltimore & Ohio R. Co.* v. *Interstate Commerce Commission*, 221 U. S. 612, 616–619.

Standards Act, but that respondent had not paid them the compensation required by those sections and had otherwise violated the Act. An injunction against further violations was sought (R. 6–7). In its amended answer (R. 20–23) respondent challenged the constitutionality of the Act,[2] admitted that some of its employees were not compensated in accordance with Sections 6 and 7, denied the applicability of the Act, and invoked various exemptions.[3]

At the close of plaintiff's affirmative case, the District Court, on its own motion, dismissed the complaint (R. 544–545). The court held that the Administrator had failed to prove that any of the warehouse employees were engaged in commerce or the production of goods for commerce (R. 541–544). The Circuit Court of Appeals affirmed the judgment in part and reversed it in part and remanded the cause for further proceedings (R. 560).

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[2] The constitutional defenses were stricken by the District Court (R. 20).

[3] The principal exemption claimed by respondent was that granted by Section 13 (a) (2) for employees of retail establishments "the greater part of whose selling * * * is in intrastate commerce." The complaint alleged violations only with respect to the warehouse employees; employees at the ten department stores were not involved. In any event, since exemptions are matters of affirmative defense and since the complaint was dismissed at the close of plaintiff's case on motion of the court (R. 545), no question concerning the application of Section 13 (a) (2) was adjudicated by the District Court or the Circuit Court of Ap-

The facts, as shown by plaintiff's evidence, may be summarized as follows: Respondent operates ten department stores, seven of which are in Illinois and three in Indiana, and three warehouses in Illinois from which goods are channelled to the various stores (R. 83–84). The warehouses are located in the central manufacturing district of Chicago (R. 84) and are served by sidings of the Chicago Junction Railroad (R. 102, 103, 112, 113, 497–501). More than 1,000 workers are employed at the warehouses (R. 38–44). A great variety of merchandise, including apparel, hardware, dry goods, toys, foods, household furniture and furnishings, automobile accessories, liquor, jewelry, books, and drugs, is received at the warehouses for distribution to the stores (R. 62–70, 217). The goods arrive by railroad and by truck (R. 59–60, 112–113). A major portion of the goods handled at the warehouses is shipped to respondent from points outside Illinois (R. 31–45). During respondent's fiscal year 1939 merchandise valued in excess of $32,000,000 moved from the warehouses to the stores, of which more than $5,000,000 went to the Indiana stores (Plaintiff's Exhibits 8, 9, 10; see R. 549–550).

This huge quantity of merchandise moves through the warehouses in a constant flow. Large

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peals (see R. 527–528, 542; cf. R. 558). The findings and record do not afford a basis for determining whether the greater part of respondent's retail selling is in intrastate commerce.

receipts and shipments occur daily (R. 120, 122, 135, 157, 203, 244, 251, 271, 284, 287, 386, 389, 404, 410, 413, 416, 420). After the goods have been unloaded and checked, they are either moved immediately to the shipping platform and sent to one of the stores (R. 124, 377, 379) or are taken by one of the unloading employees to an elevator and thence to the department of the warehouse where such goods are needed (R. 114, 115, 219). When an order is received, the goods are taken to the shipping platform, checked, loaded on one of the defendant's trailers, and taken to the store ordering the merchandise (R. 117–119). All employees at the warehouses are necessary to the movement of the goods through them (R. 96–101, 103, 120, 142, 160, 161). Respondent operates a large number of trailers and trucks for the purpose of transporting the goods from the warehouses to the stores (R. 118). Rapidity of movement through the warehouses is emphasized (R. 157, 221). Goods are frequently sent to the stores on the day of their receipt at the warehouses (R. 212, 217, 245, 248, 251, 271, 276, 280, 281, 287, 293, 377, 386, 389, 404, 405, 416, 421, 423, 427, 428, 431, 434). Respondent's merchandise manager testified that the "greatest portion" of the goods received at the warehouses were shipped out the same day (R. 221; see R. 136–138, 148, 356, 386, 392, 410, 416).

Respondent's Merchandising Division aggregates the requirements of all the stores and places orders

with extrastate suppliers to meet the total requirements (R. 39, 218–220). This centralized procurement is carried on in conjunction with a centrally planned selling program which forms the basis of the estimated requirements of each store (R. 231, 263). A six months' operating budget is prepared for each department of each store on the basis of the past sales of that department, with additions for anticipated increases in volume (R. 263). The advertising campaign for the budget period is planned to assure a proper correlation among procurement, sales quotas, and promotional activity (R. 231, 265). Within the framework of the budget, the departmental buyers plan the purchasing for each department on the basis of four-week periods (R. 264). A goal is to have half of the goods delivered to the stores before the start of the period and to have the other half available for delivery during the period (R. 264). Frequent visits to the stores keep the buyers informed concerning the sales volume and goods at hand (R. 234, 267); thus deliveries to the stores are governed not only by the figures in the budget, but also by day-to-day information with respect to current needs.

At one of the warehouses respondent maintains a multilith department in which it manufactures and binds printed forms and tablets for use in the stores (R. 92), and art, advertising, and engraving departments in which it prepares "copy" and illustrations for advertisements and performs print-

ing and engraving operations necessary to make the "mats" from which both circular advertisements and newspaper advertisements are printed (R. 438, 439, 441–446). After circulars are printed by commercial printers they are distributed in Indiana and Illinois (R. 400); respondent spends almost a million dollars a year on its circular advertising alone (*ibid.*). Advertisements prepared in these departments are printed in Chicago newspapers which are distributed outside of Illinois; they also appear in local papers in Indiana (R. 397, 401, 439).

The Circuit Court of Appeals held that the warehouse employees who move the goods into the warehouses from the unloading platforms, those who check and count it or perform other clerical functions with reference to the goods after their deposit on the unloading platforms, and those who distribute the goods to the Illinois stores, are not "engaged in commerce" (R. 559). The court also held that the employees in the multilith, art, advertising, and engraving departments were not engaged in "the production of goods for commerce" (*ibid*).

REASONS FOR GRANTING THE WRIT

1. The principal question involved in the present case is now before the Court in *Higgins* v. *Carr Brothers Co.,* No. 97, certiorari granted June 8, 1942, and is raised by the petition for certiorari in *Walling* v. *Jacksonville Paper Co.,* No. 336. In that petition we have pointed out the reasons why

we deem the question to be one of importance in the administration of the Fair Labor Standards Act.

The present case complements, in a significant respect, the presentation of the question made in the *Higgins* and *Jacksonville* cases. In those cases goods were largely ordered and brought into the State by wholesalers to satisfy the requirements of their customers, as anticipated on the basis of previous business experience. In the present case the goods are ordered and received by respondent not in anticipation of the demands of others, but to meet the budgeted and precalculated requirements of respondent's own department stores. There can be no contention here, as there is in those cases, that the goods are brought to the warehouses, and held there, "in anticipation of local sale."[4] The court below failed to recognize that where wholesale establishment and retail outlet are commonly owned and managed, the case is *a fortiori* in rela-

[4] The only sales made by respondent are sales at retail through its department stores. These sales would be relevant if the Administrator were attempting to apply the Act to employees at a warehouse which functioned as a part of the retail stores, i. e., where goods are stored at the warehouse until sold at the store by floor sample and are then delivered from the warehouse to the retail customer. Such employees would, in any event, be exempt from Sections 6 and 7 by virtue of Section 13 (a) (2) where the greater part of the retail selling is in intrastate commerce. The warehouses here involved are not of that type. When held at respondent's warehouses at all, the goods are held for delivery to the stores, not for "local sale."

tion to the "prior order" situation; indeed, while the court pointed to the latter situation as one in which interstate commerce continues past the warehouses, it relied upon the fact that respondent received no prior orders from its own stores (R. 556). But respondent's stores are in no sense "customers" of a wholesaling establishment; they constitute the retail outlets of a single enterprise which allocates goods among the outlets, purchases the requisite goods, passes them through its warehouses, and distributes them among the stores. There would appear to be no greater force to a contention that the interstate journey is terminated by delivery to the distributing agent of the purchaser than there would be with respect to delivery to such an agent of the seller. Cf. *Binderup* v. *Pathe Exchange,* 263 U. S. 291, 303; *DeLoach* v. *Crowley's, Inc.,* 128 F. (2d) 378, 379 (C. C. A. 5).

The circumstances of the present case further demonstrate the fictitious and arbitrary nature of a line drawn sharply at the warehouses' unloading platform. If the incoming goods are checked while they are still on the trucks the checkers are covered by the Act, but if the identical work is performed after the goods touch the platform the checkers are excluded (R. 555, 559). And since the court thought that the line must be drawn whether or not the goods are to pass again in commerce to the In-

diana stores (R. 559),[5] there are employees who perform "local" tasks between the segment of commerce which ends at the unloading platform and the segment which concededly begins, perhaps immediately thereafter,[6] at the packing table.

2. The Circuit Court of Appeals held, without discussion (see R. 559), that the employees of respondent who are engaged in manufacturing forms and paper tablets for use in the department stores, including those in Indiana, or in the preparation of respondent's advertising copy for Indiana and Illinois newspapers, or in the preparation of circulars for distribution in both States, are not engaged in "the production of goods for commerce" within the meaning of Sections 6 and 7 of the Act. The work of these employees is, rather plainly, necessary to the production of goods which pass in interstate commerce. *Kirschbaum* v. *Walling,* No. 910, last Term, decided June 1, 1942; Section 3 (i). There are thousands of employees engaged in the

[5] As stated, *supra*, p. 5, during respondent's fiscal year 1939, goods valued in excess of $5,000,000 passed through the warehouses to the Indiana stores (Pltfs. Exhs. 8, 9, 10; see R. 549–550).

[6] The rapidity of movement through the warehouses is somewhat greater here than it is in either the *Higgins* or *Jacksonville* cases. A large part of the goods received was shipped out the same day (*supra*, pp. 5–6), a practice made possible by allocation of the goods prior to their arrival. Where the goods are actually *in transitu* from the time they leave the hands of the carrier until they arrive at respondent's stores, the principles laid down by the court below are impossible to apply.

preparation of such articles whose status under the Act is thrown into sharp question by the decision below.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

IRVING J. LEVY,
Acting Solicitor, United States Department of Labor.

SEPTEMBER 1942.